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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1383

RICHARD A. GANT, *et al.*,

Petitioners,

v.

UNION BANK, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT COLONIAL GROWTH SHARES, INC. IN OPPOSITION

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Colonial Growth Shares, Inc.

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The respondent, Colonial Growth Shares, Inc., respectfully requests that this Court deny the petition for writ of certiorari. The Ninth Circuit's opinion, which is reprinted in the appendicies to the petition, A-2-47, is reported at 609 F.2d 411.

The respondent is satisfied with the petitioners' statements concerning jurisdiction, the question presented and the constitutional provisions involved. The respondent adopts the petitioners' statement of the case subject to the following corrections and additions.

First, Colonial Growth Shares, Inc., is the only remaining plaintiff in this case. All the petitioners and all the respondents except Colonial are defendants. All the other plaintiffs have settled. Colonial is plaintiff in two actions, *Colonial Growth Shares, Inc. v. Touche Ross & Co., et al.* (Civ.

No. 74-436-T) and *Colonial Growth Shares, Inc. v. Brown, Wood, Fuller, Caldwell & Ivey, et al.* (Civ. No. 77-454-T). The first asserts claims against Touche Ross, Union Bank and various individuals for damages sustained in an alleged scheme to defraud involving securities of U.S. Financial, Incorporated. The second alleges the same claims solely against Brown, Wood, the law firm that acted as U.S. Financial's underwriting and outside general counsel. Colonial's complaints allege violations of the Securities Exchange Act of 1934 and assert pendant common law claims of fraud and negligence. Unlike many of the plaintiffs who have settled, Colonial does not allege violations of the Securities Act of 1933.

Second, the order of the district judge was not a final decision. The district judge certified his order for an interlocutory appeal pursuant to 28 U.S.C. 1292(b). However, in accordance with 1292(b), there has been no stay of the pre-trial proceedings in the district court. The district judge ordered that "the parties shall submit their pretrial briefs and in all other respects comply with the existing pretrial schedule." A-73. Pre-trial discovery is virtually completed, and the case will soon be ready for trial.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS OR WITH ANY DECISION OF THIS COURT

The Ninth Circuit is the only court of appeals which has yet considered the question presented in the petition. There is no persuasive reason to grant certiorari to consider that issue when it is possible that all other courts of appeals will be in accord with the decision of the Ninth Circuit and that none will differ. A conflict between the decision of the Ninth Circuit and the decisions of a handful of district

court decisions, some of them in the Ninth Circuit, hardly justifies review.

In an effort to demonstrate that the decision of the Ninth Circuit is in conflict with a decision of the Supreme Court, petitioners argue that the court of appeals below "rejected" the "*Ross* test."* However, the court of appeals did not "reject" the *Ross* test. It simply did not agree with petitioners that the dictum contained in footnote 10 of the *Ross* decision should be interpreted as establishing a radical new constitutional test for determining when the seventh amendment applies. A-28-33; 609 F.2d at 424-26.

In an effort to demonstrate that the decision of the Ninth Circuit is in conflict with decisions of other courts of appeals, petitioners cite six court of appeals decisions which allegedly conflict with the decision of the Ninth Circuit because they have used the three pronged *Ross* test to determine the right to a jury trial. P-12-13. None involved the question whether there exists a "complexity exception" to the right to a jury trial. None interpreted the "practical abilities and limitations of juries" factor in *Ross* as establishing a new test for determining when the seventh amendment applies. Therefore, none is in conflict with the holding of the Ninth Circuit.

II. THE INTERLOCUTORY NATURE OF THIS PROCEEDING AND THE SETTLEMENT OF ALL BUT ONE OF THE PLAINTIFFS MAKES REVIEW INAPPROPRIATE AT THIS TIME

Because of the interlocutory nature of this proceeding, the question whether it really involves issues too complex for a jury to decide is necessarily abstract. This case does not involve a factual determination, made by a district

* *Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).*

judge, following a jury trial, that the case has proved to be too complex for the jury. Instead, it involves a prediction that the case will be too complex for any jury. For purposes of review in this court, it would be far better to review a final decision, where a concrete factual determination has been made, rather than, as here, one in which the factual conclusion, which forms the basis for the decision under review, is merely conjectual. This is especially true in a case such as this one in which the facts have changed substantially since the time of the district court's decision. In this case all but one of the plaintiffs have settled. It cannot be gainsaid that this has greatly simplified the case and has eliminated completely the complexity stemming from numerosity of plaintiffs, including three classes of securities purchasers, and numerosity of claims, which so troubled the district court. If, as the district judge predicted and as the petitioners fear, the trial of this case really does prove to be beyond the abilities of the jury, then review could be sought at that time upon a full record. Certainly, if this court is to decide whether to recognize a "complexity" exception to the seventh amendment right to a jury trial, it should do so in a case which has actually been proved to be too complex for the jury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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